STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Sawyer, PJ, O'Connell and Smolenski, J.J.

LISA ROBERTS,

Plaintiff-Appellee,

vs.

MECOSTA COUNTY GENERAL HOSPITAL, a Michigan County Hospital, GAIL A. DESNOYERS, M.D., MICHAEL ATKINS, M.D. BARB DAVIS, OBSTETRICS AND GYNECOLOGY OF BIG RAPIDS, P.C., a Michigan professional corporation, f/k/a GUNTHER, DESNOYERS & MEKARU, jointly and severally,

Defendants-Appellants.
/

Current Supreme Court No.'s 122312, 122335, 122338

Previous Supreme Court No.'s: 116563, 116570, 16573

Court of Appeals No.: 212675

Mecosta County Circuit Ct. No.: 97-12006-NH

Plaintiff-Appellee's Brief on Appeal

Proof of Service

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. DID THE COURT OF APPEALS CORRECTLY DECIDE THAT PLAINTIFF'S NOTICES OF INTENT COMPLIED WITH MCL 600.2912b?

Plaintiff-Appellee says "Yes".
Defendants-Appellants say "No".
The Court of Appeals said "Yes".
The trial court would say "No".

II. DETERMINING WHETHER A NOTICE OF INTENT IS SUFFICIENT FOR TOLLING PURPOSES, SHOULD THIS COURT APPLY A SUBSTANTIAL COMPLIANCE STANDARD, OR AT LEAST REJECT AN OVERLY TECHNICAL CONSTRUCTION IN LIGHT OF THE CONTEXT IN WHICH NOTICE IS GIVEN?

Plaintiff-Appellee says "Yes".
Defendants-Appellants say "No".
The Court of Appeals did not address this issue.
The trial court would say "No".

III. PER THE STATUTORY DEFINITION OF "COMPLIANCE" CONTAINED IN MCL 600.2912b(2), WAS THE PLAINTIFF'S NOTICE OF INTENT IN COMPLIANCE WITH §2912b SUCH THAT THE STATUTE OF LIMITATIONS WAS TOLLED?

Plaintiff-Appellee says "Yes".
Defendants-Appellants would say "No".
The Court of Appeals did not address this issue.
The trial court did not address this issue.

IV. DOES APPLICATION OF MCL 600.5856(d) TO DEPRIVE PLAINTIFF OF HER CLAIM ON STATUTE OF LIMITATIONS GROUNDS VIOLATE HER DUE PROCESS RIGHTS UNDER THE STATE AND FEDERAL CONSTITUTIONS?

Plaintiff-Appellee says "Yes".
Defendants-Appellants say "No".
The Court of Appeals did not address this issue.
The trial court held the statute to be constitutional but did not specifically address this issue.

Counterstatement of Facts and Proceedings[1]

This medical malpractice action arises from the negligence of the defendants in failing to diagnose and treat Plaintiff Lisa Robert's ectopic pregnancy in September and October 1994. (15a-27a.) As a result, her left fallopian tube burst. Because Mrs. Roberts lost her right fallopian tube when she experienced a previous ectopic pregnancy in 1987, the defendants' negligence in the fall of 1994 caused her to be unable to have children, absent the success of expensive and extraordinary medical procedures, such as in vitro fertilization. (15a-27a.)

This case was dismissed with prejudice by the Mecosta County Circuit Court on June 17, 1998 on grounds that the statute of limitations had run. (190a-191a.) The trial court believed that the notices of intent to sue sent out by Mrs. Roberts' attorney did not contain all of the information required under MCL 600.2912b(4). (184a.) The trial court held that because of this insufficiency, Mrs. Roberts was not entitled to the benefit of the tolling provision established in MCL 600.5856(d) and therefore, the statute of limitations had expired on her claim. (190a-191a.) Mrs. Roberts' original appeal to the Court of Appeals arose as a result of that dismissal. (234a.)

The Notices of Intent

On August 15, 1996, Colleen V. Kavanaugh, then attorney for Mrs. Roberts, mailed a "Section 2912B Notice of Intent to File Claim" to Defendant Mecosta County General Hospital. (6a-8a.) Subsequently, on September 19, 1996, Ms. Kavanaugh mailed an "amended" notice to the defendant hospital. (158a, 9a-10a.) Notices were mailed to the

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[1]All Appendix citations contained in this Brief will be to the Appendix submitted by Defendant-Appellant Michael Atkins, M.D.

remaining defendants in this action: Obstetrics & Gynecology of Big Rapids, P.C.; Gail A. DesNoyers, M.D.; Michael Atkins, M.D.[2], and Barb Davis, P.A.C. on September 23, 1996. (11a-13a.)

The September 23, 1996 "Notice" to the non-hospital defendants stated:

> This Notice is intended to apply to the following health care professionals, entities, and/or facilities as well as any employees or agents, actual or ostensible, thereof, who were involved in the treatment of the patient, Lisa Roberts:
>
> OBSTETRICS & GYNECOLOGY OF BIG RAPIDS, GAIL DESNOYERS, M.D., MICHAEL ATKINS, M.D., BARB DAVIS, PAC, AND ALL AGENTS AND EMPLOYEES, ACTUAL OR OSTENSIBLE, THEREOF.
>
> 1. FACTUAL BASIS FOR CLAIM
> This is a claim for negligence which occurred on October 4, 1994, at Obstetrics & Gynecology of Big Rapids. It is claimed that on said date while pregnant with her first child, Claimant presented herself to Barb Davis, PAC, Dr. Michael Atkins, and Dr. Gail DesNoyers complaining of severe abdominal pain and bleeding. At that time a diagnosis of a spontaneous abortion was made and a D & C was performed at Mecosta County General Hospital. Claimant was sent home at that time, despite Dr. DesNoyers's knowledge of Claimant's history of a prior ectopic pregnancy.
>
> Over the course of the next few days, Claimant continued to experience pain and cramping and, on October 7, 1994, was seen at Mecosta County General Hospital by Dr. Michael Atkins. Claimant was told that the pain she was experiencing

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[2]Defendant Atkins asserts that he did not receive the Notice of Intent dated September 23, 1996, in which he was named as a potential defendant, until after this litigation was commenced. (Def. Atkins' Brief, p.4) Although his attorney alleges he never received it, a review of the lower court record demonstrates that Dr. Atkins never filed any affidavit or evidentiary support to establish this alleged fact.

What is clear is that the notice was mailed to him ***at the hospital*** (11a). This is all the statute requires. MCL 600.2912b(2). Receipt is not required. What is also clear, and what Defendant Atkins has never denied, is that he was aware of the notice, and knew of the claims being made before the statute of limitations ran.

was cramps from the D & C she had done and was sent home.

Claimant returned to the hospital on October 8, 1994, wherein it was discovered that Claimant had not had a spontaneous abortion but had an ectopic pregnancy in her left tube which had burst. Emergency surgery was performed at that time and her left tube was removed.

Claimant had her right tube removed approximately ten years ago and, as a result of the negligence set forth above, she is now unable to have any children.

2. THE APPLICABLE STANDARD OF PRACTICE OR CARE ALLEGED

Claimant contends that the applicable standard of care required that Obstetrics & Gynecology of Big Rapids, Dr. Gail DesNoyers and Barb Davis, PAC, provide the Claimant with the services of competent, qualified and licensed staff of physicians, residents, interns, nurses and other employees to properly care for her, render competent advice and assistance in the care and treatment of her case and to render same in accordance with the applicable standard of care.

3. THE MANNER IN WHICH IT IS CONTENDED THAT THE APPLICABLE STANDARD OF PRACTICE OR CARE WAS BREACHED

Claimant claims that Obstetrics / Gynecology of Big Rapids, Dr. Gail DesNoyers and Barb Davis, PAC, failed to provide her with the applicable standard of practice and care outlined n paragraph 2 above.

4. THE MANNER IN WHICH THE BREACH WAS THE PROXIMATE CAUSE OF CLAIMED INJURY

See paragraph 2 above.

5. THE MANNER IN WHICH THE BREACH WAS THE PROXIMATE CAUSE OF THE CLAIMED INJURY.

See paragraph 2 above.

6. NAMES OF HEALTH PROFESSIONALS, ENTITIES, AND FACILITIES NOTIFIED

> OBSTETRICS / GYNECOLOGY OF BIG RAPIDS, GAIL DESNOYERS, M.D., MICHAEL ATKINS, M.D., BARB DAVIS, PAC, AND ALL AGENTS AND EMPLOYEES, ACTUAL OR OSTENSIBLE, THEREOF.
>
> TO THOSE RECEIVING NOTICE: YOU SHOULD FURNISH THIS NOTICE TO ANY PERSON, ENTITY OR FACILITY, NOT SPECIFICALLY NAMED HEREIN, THAT YOU BELIEVE MIGHT BE ENCOMPASSED IN THIS CLAIM.

(12a-13a, emphasis per original.)[3]

The "Amended Notice" of September 19, 1996 to the defendant hospital also described the basis for the claim against that facility:

> This Notice is intended to apply to the following health care professionals, entities, and/or facilities as well as any employees or agents, actual or ostensible, thereof, who were involved in the

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[3]In his Statement of Facts, Dr. Atkins asserts that this notice "limited itself" to claims of negligence on October 4, 1994 at Obstetrics & Gynecology of Big Rapids, and does not cover claims arising on October 8, 1994 when Dr. Atkins saw Lisa Roberts in the defendant hospital's emergency room. This assertion reflects a tunnel-visioned reading of the notice. Looking to the very first, underlined paragraph of the notice, it specifically states that this notice of claim is "intended to apply to ... MICHAEL ATKINS, M.D". The second to the last paragraph reiterates that Dr. Atkins is one of the health care professionals being notified of a claim and the final paragraph urges him to furnish the notice to anyone he might believe should be encompassed by the claim. Given such language, Dr. Atkins cannot credibly maintain that he did not know a claim for negligence was being asserted against him. The "Factual Basis for Claim" specifically identifies Dr. Atkins as treating the plaintiff at the hospital on October 7, 1994, and states that he told her she simply had cramps from her D& C and sent her home, when in fact she had an ectopic pregnancy. Again, reading these facts, which set forth a failure to diagnose true medical condition, Dr. Atkins could not reasonably have failed to understand that a claim was being made against him or the nature of the claim. While the medical records do indicate that plaintiff was seen by Dr. Atkins on October 8, rather than October 7, the time at which he saw plaintiff should be noted – it was **1:50 AM**, the middle of the night.(1a-2a) It is easy to understand why the plaintiff would have believed treatment occurred on October 7, since she lost consciousness in her home sometime before midnight late that evening and was transported to the hospital by ambulance. (21a-22a, ¶¶ 50-51.) Lisa Roberts lives in the Village of Sears in Clare County (16a, ¶ 1) which is almost a 1 hour drive from the Mecosta County General Hospital in Big Rapids.

treatment of the patient, Lisa Roberts:

MECOSTA COUNTY GENERAL HOSPITAL AND ALL AGENTS AND EMPLOYEES, ACTUAL OR OSTENSIBLE, THEREOF.

1. FACTUAL BASIS FOR CLAIM

This is a claim for negligence which occurred on October 4, 1994, at Mecosta County General Hospital. It is claimed that on said date while pregnant with her first child, Claimant presented herself to Mecosta County General Hospital complaining of severe pain. At that time a diagnosis of a spontaneous abortion was made and a D and C was performed. Claimant was sent home at that time.

Over the course of the next few days Claimant continued to experience pain and cramping and, on October 7, 1994, was again seen at Mecosta County General Hospital. Claimant was told that the pain she was experiencing was cramps from the D and C she had done and was sent home.

Claimant returned to the hospital on October 8, 1994, wherein it was discovered that Claimant had not had a spontaneous abortion but had an ectopic pregnancy in her left tube which had burst. Emergency surgery was performed at that time and her left tube was removed.

Claimant had her right tube removed approximately ten years ago and, as a result of the negligence set forth above, she is now unable to have any children.

2. THE APPLICABLE STANDARD OF PRACTICE OR CARE ALLEGED

Claimant contends that the applicable standard of care required that Mecosta County General Hospital provide the claimant with the services of competent, qualified and licensed staff of physicians, residents, interns, nurses and other employees to properly care for her, render competent advice and assistance in the care and treatment of her case and to render same in accordance with the applicable standard of care.

3. THE MANNER IN WHICH IT IS CONTENDED THAT THE APPLICABLE STANDARD OF PRACTICE OR CARE WAS BREACHED

See paragraph 2 above.

4. THE MANNER IN WHICH THE BREACH WAS THE PROXIMATE CAUSE OF CLAIMED INJURY

See paragraph 2 above.

5. THE MANNER IN WHICH THE BREACH WAS THE PROXIMATE CAUSE OF THE CLAIMED INJURY.

See paragraph 2 above.

6. NAMES OF HEALTH PROFESSIONALS, ENTITIES, AND FACILITIES NOTIFIED

MECOSTA COUNTY GENERAL HOSPITAL AND ALL AGENTS AND EMPLOYEES, ACTUAL OR OSTENSIBLE, THEREOF.

TO THOSE RECEIVING NOTICE: YOU SHOULD FURNISH THIS NOTICE TO ANY PERSON, ENTITY OR FACILITY, NOT SPECIFICALLY NAMED HEREIN, THAT YOU BELIEVE MIGHT BE ENCOMPASSED IN THIS CLAIM.

(9a-10a, emphasis per original.)

Following mailing of the notices of intent to sue to the various defendants, the insurance companies that provided coverage for the defendant hospital and defendants DesNoyers, Davis, and OB/GYN of Grand Rapids contacted Mrs. Roberts' counsel by letter requesting additional information and authorizations that would allow them to obtain her medical records. (148a, ¶¶5-6; 147a-176a). Copies of signed authorizations and copies of medical records were provided in response. (*Id*). There were also numerous telephone discussions between the adjusters for the insurers and Mrs. Roberts' counsel, Ms. Kavanaugh,) (148a, ¶¶5-6). At no time was there any indication from these insurers that

nature of the claim being asserted in the notice was ambiguous. (148a, ¶¶6-8, 11, 13). Ms. Kavanaugh explained in her affidavit, filed in opposition to defendants' motions for summary disposition in the trial court: "Certainly, it was well understood by the adjusters that there was a failure to timely diagnose an ectopic pregnancy and none of the insurance representatives seemed to be confused as to the facts, claims of wrongdoing, and damages alleged by Claimant, Lisa Roberts." (148a, ¶6).

Suit Is Filed

On February 25, 1997, following expiration of the 154 day waiting period set forth in §2912b(1)[4], Mrs. Roberts filed the present medical malpractice action against the defendants. (229a-No.1). The Complaint was accompanied by the requisite affidavits of merit. (229a-No. 2.).

Trial Court Proceedings

In April 1997, Mecosta County General Hospital filed a motion for summary disposition alleging, among other things, that Mrs. Roberts' case should be dismissed on statute of limitation grounds.[5] In that motion, the defendant hospital asserted for the first time that the notice of intent served upon it was insufficient because it allegedly did not contain all of the information required by §2912b(4). Defendant argued that because the notice was defective, its service did not toll the running of the statute of limitations during

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[4]The 154 day period, as opposed to the 182 day period applied to this case because none of the defendants filed answers to the notice of intent. MCL 600.2912b(8).

[5]The two year statute of limitations on plaintiff's claim under MCL 600.5805(6) would have expired on October 8, 1996. Thus, when the notice was given to the defendant hospital on August 15, 1996, there were 54 days remaining in the limitations period. There were 15 days remaining in the limitations period on September 23, 1996 when notice was given to the remaining defendants.

the statutory waiting period under MCL 600.5856(d), and Mrs. Roberts' claim was, therefore, time-barred. Dr. Atkins also filed a motion for summary disposition asserting this same ground for dismissal.

The motions were heard on August 22, 1997. It was Lisa Roberts' position that the notices were sufficient to toll the statute, that defendants had adequate notice of the claims against them, and that dismissal was an inappropriate remedy. (41a-43a, 45a, 50a-52a).

The trial court, after hearing argument, held that the notices of intent to sue sent to Mecosta General Hospital and Dr. Atkins were facially insufficient under §2912b and, as a result, their mailing did not toll the running of the statute of limitations. (46a-48a, 53a-55a). Accordingly, it ruled that summary disposition should be granted to defendants under MCR 2.116(C)(7) because the statute of limitations had run by the time suit was filed in February, 1997. (55a). An order was entered to that effect on September 4, 1997 with respect to Dr. Atkins, and on September 10, 1997 as to Mecosta County General Hospital. (85a-88a; 232a-No's. 63, 65).

On August 25, 1997, shortly after the hearing on the defendant hospital and Dr. Atkin's motions, Defendants DesNoyers, Davis, and Obstetrics and Gynecology of Big Rapids, P.C., filed their motion for summary disposition on the same statute of limitations grounds successfully urged by the other defendants. On September 23, 1997, Mrs. Roberts responded to that motion, as well as filing a motion for reconsideration with respect to the court's ruling granting summary disposition to the other two defendants. In her briefs and supplemental briefs to the court and supporting materials, she raised issues regarding waiver of defects in the notice, challenged the court's finding that the notice was not sufficient to comply with the statute, asserted that substantial compliance with the

notice should be deemed sufficient, argued that dismissal was inappropriate absent a showing of prejudice to the defendants due to inadequate notice, and challenged the constitutionality of §2912b on several grounds.

On October 17, 1997, the court heard oral argument on Defendants DesNoyers', Davis', and Obstetrics and Gynecology of Big Rapids' motion for summary disposition. The court took the matter under advisement while it considered Mrs. Roberts' motion for reconsideration on the earlier summary disposition rulings. (143a.)

On October 22, 1997, the trial court entered its order granting reconsideration of the summary disposition entered in favor of Dr. Atkins and the defendant hospital. The order further stated that the remaining defendants' motion for summary disposition would be decided after the motion for reconsideration. (178a.)

The court issued its opinion on reconsideration on May 6, 1998. (181a-191a.) It affirmed its earlier grant of summary disposition, and also granted summary disposition to the remaining defendants. (*Id*) Specifically, the trial court held:

> (1) Based on *Neal v Oakwood Hospital Corp*, 226 Mich App 701; 575 NW2d 68 (1997), no showing of prejudice is required before a case can be dismissed for failure to comply with MCL 600.2912b;
>
> (2) Based on *Neal, supra*, MCL 600.2912b is not unconstitutional;
>
> (3) Substantial compliance with the notice requirement is not sufficient to toll the statute of limitations under MCL 600.5856(d); and
>
> (4) Dismissal was an appropriate remedy here because the statute of limitations had run.

(183a-190a.)

An order of dismissal with prejudice as to all defendants was entered on June 17, 1998 (193a-194a), and it was from that order that Mrs. Roberts claimed her original appeal to the Court of Appeals 5 years ago.

Appellate Proceedings

The Court of Appeals reversed in an opinion released on March 3, 2000. *Roberts v Mecosta County General Hospital,* 240 Mich App 175; 610 NW2d 285 (2000). That court did not address the adequacy of plaintiff's notice, but did find that: (1) the defendants were given notice under the statute which informed them that plaintiff claimed they were negligent in treating her, thus resulting in injury to her; (2) the notice was given within the limitations period; and (3) defendants never asserted that the notice was deficient until after the complaint was filed, when the statute of limitations had run. *Supra*, 240 Mich App at 184. The court concluded that defendants had waived any right to assert alleged deficiencies in the notice as a ground for dismissal with prejudice because they failed to raise those objections before the complaint was filed. *Id* at 184-185.

On January 30, 2001, this Court granted leave to appeal to all defendants. In a 5-2 decision rendered on March 24, 2002, it reversed and held that defendants had no obligation to challenge the Mrs. Roberts' compliance with §2912b until the plaintiff filed suit. It concluded, therefore, that such objections could not be waived. *Roberts v Mecosta County General Hospital*, 466 Mich 57, 67; 642 NW2d 663 (2002). It then remanded to the Court of Appeals "recognizing that the panel did not reach a determination regarding whether the trial court erred in concluding that plaintiff's notice of intent did not comply with §2912b(4)." *Id* at 71. Dr. Atkins has asserted that comments were made by members of

this Court during oral argument concerning the sufficiency of the notice (Def. Atkins' Brief, p. 6), this Court actually took pains to clarify that it was "express[ing] no opinion concerning plaintiff's compliance or noncompliance with MCL 600.2912b". *Id*, fn 8.

On remand, the Court of Appeals once again held that the case should not have been dismissed. *Roberts v Mecosta County General Hospital*, 252 Mich App 664; 653 NW2d 441 (2002). The Court of Appeals panel went through each of the requirements listed in §2912b(4)(a-f) and applied them to the notices of intent. It found that the trial court had erred and that plaintiff's notices did comply with the statute. The court concluded:

> In sum, while the notices of intent in this case may not represent the picture of clarity and certainly do not represent the "perfect notice," they do comply with the statute. To declare them inadequate would require that we read into the statute requirements that simply do not exist. Accordingly, we conclude that the trial court erred in determining that the notices were inadequate and in dismissing the case based upon that determination.

Supra, at 673.

Defendants again sought and were again granted leave to appeal from the Court of Appeals' decision. (App. 227a-228a). In its order granting leave, this Court specified that "[a]mong the issues to be briefed, the parties shall address whether plaintiff complied with the requirements of MCL 600.2912b(4) and whether strict compliance or some lesser standard of compliance applies to plaintiff's notice of intent under that provision."

ARGUMENT

I. THE COURT OF APPEALS DID NOT ERR IN CONCLUDING THAT PLAINTIFF'S NOTICES OF INTENT COMPLIED WITH MCL 600.2912b(4).

In *Roberts v Mecosta County General Hospital*, 466 Mich 57; 642 NW2d 663 (2002), this Court remanded this matter to the Michigan Court of Appeals to decide "whether the trial court erred in concluding that plaintiff's notices of intent did not comply with §2912b(4)." The focus of this Court's remand order and of the Court of Appeals August 27, 2002 decision was subsection 4 of §2912b. While plaintiff believes, for reasons stated, *infra*, that §2912b(4) does not, by itself, provide the answer to the legal questions presently before the Court, plaintiff will begin this brief by addressing the substance of the particular subsection of §2912b which this Court identified in its remand order.

Before commencing a cause of action premised on medical malpractice, a claimant must give notice of his/her intent to sue to the potential defendants. The claimant may not proceed directly to suit; that claimant must, instead, notify the potential defendants of his/her intent to file suit and wait the statutorily prescribed period of time before filing suit.

MCL 600.2912b(4) provides:

> The notice given to a health professional or health facility under this section shall contain a statement of at least all of the following:
>
> (a) The factual basis for the claim.
>
> (b) The applicable standard of practice or care alleged by the claimant.
>
> (c) The manner in which it is claimed that the applicable

standard of practice or care was breached by the health professional or health facility.

(d) The alleged action that should have been taken to achieve compliance with the alleged standard of practice or care.

(e) The manner in which it is alleged the breach of the standard of practice or care was the proximate cause of the injury claimed in the notice.

(f) The names of all health professional and health facilities the claimant is notifying under this section in relation to the claim.

Id.

The defendants have concentrated their arguments before this Court on §2912b(4)'s use of the mandatory, "shall", in describing the contents of a claimant's intent to sue. Plaintiff acknowledges that, based on this language, she cannot contest the fact that the notice of intent to sue must contain some statement of the six items listed in §2912b(4)(a) - (f).

However, before examining the notices of intent to sue at issue in this case, there are several additional observations regarding the text of §2914b(4) which must be made. First, as the Court of Appeals properly observed, while the statute requires some "statement" regarding the six factors listed in §2912b(4), "nothing in the statute requires that the notice of intent be in a particular format or that each of the six statutory items be separately listed or identified." *Roberts*, 252 Mich App at 672. Thus, in considering whether a notice of intent to sue contains a statement of all six of §2912b(4)'s factors, it stands to reason that the notice must be considered as a whole.

Although §2912b(4) describes the information which a notice of intent to sue must

contain, it is notably silent as to the level of specificity with which that information must be conveyed. Section 2912b(4) indicates only that the notice must contain *a statement* of the six enumerated factors.

In considering the scope of §2912b(4)'s requirement of only "a statement" pertaining to the six factors identified therein, it is most important to consider more specific qualifying language which could have been written into that subsection but was not. A comparison of other Michigan statutes in which a person or agency is compelled to make a "statement" is instructive. For example, in other contexts, the Michigan Legislature has written statutes which demand that a person state or identify certain facts "with specificity." *See e.g.* MCL 333.17015(10); MCL 333.22231(4); MCL 769.1a(8). *See also* MCL 38.416; ("stating specifically"); MCL 500.8133(3) (same). Obviously, the Legislature could have included similar language in §2912b(4), but did not. Clearly, a textual interpretation of §2912b(4) cannot support the conclusion that any statement made under that subsection must be made "with specificity."

Similarly, the Michigan Legislature has in numerous other statutes required certain persons to present a "detailed statement" of certain facts. *See e.g.* MCL 38.14; MCL 125.1510(1); MCL 408.1027(2)(b); MCL 462.319(1)(a); MCL 600.557b(2); MCL 600.6461(2). In drafting §2912b(4), the Legislature clearly did not require a "detailed statement" of the various factors described therein.

In other circumstances, the Legislature has mandated that parties prepare a "full statement," *e.g.* MCL 224.25; MCL 491.920(3); MCL 500.424(2), or a "complete statement" of certain designated facts. MCL 14.283; MCL 462.2(2). There are, moreover, a number

of statutes in which the Michigan Legislature has demanded a "full and complete statement" of certain facts. *See e.g.* MCL 247.172; MCL 324.51904; MCL 390.758. The Michigan Legislature is also fully capable of drafting a statute which requires a "complete statement in detail," MCL 224.25, or a statute which requires a "complete and specific statement" of certain facts, MCL 324.20114(8).

Section 2912b(4), therefore, requires *a statement* of six designated factors; it clearly does not mandate a full or complete statement of these factors. Indeed, it does not even require that the notice of intent to sue provide information at a level which is commensurate with the information then available to the plaintiff. *Cf* MCL 324.20138(3) (requiring that a petition filed under the Environmental Protection Act must set forth certain information "with as much specificity as possible.")[6]

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[6]The fact that §2912b(4) does not require a "full" or "complete" statement of the various factors identified in that subsection dispenses with another theme offered in the defendants' briefs. The defendants have referred the Court to the Complaint which was later filed in this case and have suggested that there are theories contained therein which were not mentioned in plaintiff's notice of intent to sue. While plaintiff disagrees with the defendants' factual assessment that there are differences between plaintiff's notice and the Complaint, plaintiff would stress that, even if a medical malpractice Complaint does not completely parallel the notice of intent, that fact has nothing to do with the plaintiff's compliance with the literal language of §2912b(4). Taking the text of §2912b(4) as it was written, what is required is ***a*** statement of the factual basis for the claim, ***a*** statement of the applicable standard of practice, ***a*** statement of the manner in which the plaintiff claims the standard of care was breached, *etc*. Thus, as long as the notice of intent to sue contains ***a*** statement of the six factors identified in §2912b(4), this subsection has been complied with, regardless of the contents of the later filed Complaint. As long as the notice contains ***a*** statement of the §2912b(4) factors, it is absolutely irrelevant for purposes of compliance with that subsection if the Complaint alleges additional facts or theories. The use of the indefinite article in §2912b(4) has obvious significance which this Court cannot ignore. *Cf State Farm, Fire & Casualty Company v Old Republic Insurance Company*, 466 Mich 142, 147-149; 644 NW2d 715 (2002); *Robinson v City of Detroit*, 462 Mich 439; 613 NW2d 307 (2000). Again, the Michigan Legislature certainly could have drafted a notice of intent statute which would have dictated that the prospective plaintiff identify each and every way in which the

Finally, there is, as the Court of Appeals recognized, one other adjective which does not appear in §2912b(4) - "accurate". *Roberts*, 252 Mich App at 670-671. Unlike a number of other Michigan statutes which have required an "accurate statement" of specified facts, §2912b(4), does not require that the statement of the six factors listed in that subsection be objectively accurate. *Cf.* MCL 288.575(a)(v); MCL 21.44a(1); MCL 289.1109(h)(v); MCL 440.2803(1)(g)(iii)(C) (requiring a "complete and accurate statement.")

Examining the language of §2912b(4) in light of the other Michigan statutes requirement "statements" demonstrates that several of the arguments advanced in this Court by the defendants are textually unsupportable. For instance, Mecosta General Hospital asserts in its brief that in drafting §2912b(4), the Michigan Legislature intended that "the plaintiff disclose at least the essential elements of her malpractice claim, *holding nothing back.*" Mecosta General Hospital Brief, p. 11 (emphasis added). This is, of course, an incorrect interpretation of §2912b(4), which does not even require a "specific" or "detailed" statement of the enumerated factors, much less a "full" or "complete" statement of all of the essential elements of a claim. There is absolutely nothing in the statutory requirement of "a statement" of §2912b(4)'s factors to suggest that plaintiff is prohibited from "holding anything back."

Similarly, Dr. DesNoyers[7] claims in her Brief that §2912b(4) "obligates that the

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standard of carte was breached. But it did not and §2912b(4) simply cannot be read as requiring a "full", "complete" or "exhaustive" statement of any of the factors listed in §2912b(4).

[7]For simplicity purposes, the brief which has been filed on behalf of Dr. DesNoyers, Barb Davis and Obstetrics and Gynecology of Big Rapids, P.C. will be identified as Dr. DesNoyer's brief.

plaintiff advise the defendants of the strength of [her] case. It obligates the plaintiff to 'lay her cards out on the table.'" DesNoyers Brief, p. 13. There is again no textual support for such a reading of §2912b(4). That subsection does not require the plaintiff to give potential defendants any notion of the strength of her claim. Furthermore, there is nothing in that statute which compels the plaintiff to, in the poker analogy, "show all of her cards." Certainly, the Legislature could have written such a statute, but clearly it did not.

For his part, Dr. Atkins contends that §2912b(4)'s provisions "are intended to *specifically* outline the nature of the claim *in some detail* so that the potential defendant(s) know *exactly* what acts of negligence he . . . is alleged to have committed." Atkins' Brief, p. 25 (emphasis added). While plaintiff will not hazard a guess as to whether this was or was not the intent of the Legislature in enacting §2912b(4), what is undisputably clear is that the text of this subdivision offers no support whatsoever for Dr. Atkins's reading of §2912b(4). Again, there is no question that the Michigan Legislature *could have* drafted a statute requiring a "specific", "detailed" or "exact" notice of intent to sue. But the fact that it did not, refutes Dr. Atkins' interpretation of this provision.

Dr. Atkins also focuses on a factual misstatement in Mrs. Roberts' notice of intent to sue and he announces, "certainly, the Legislature intended that a potential defendant be given accurate information related to his or her specific care and treatment" Atkins Brief, p. 10. Even this seemingly innocuous statement reads too much in §2912b(4). If the Michigan Legislature intended to make factual accuracy of the statements contained in §2912b(4) a necessary precondition to compliance with that section, it need only have inserted the word "accurate" before the word "statement" as it has done in several other statutes. But the Legislature, perhaps cognizant of the fact that a notice of intent to sue

is prepared at the earliest stage of the litigation process, did not do so. It did not decree that the statement to be provided under §2912b(4) must be objectively "accurate" or that compliance with §2912b(4)'s requirements hinges on the accuracy of the statements contained therein.[8]

This Court has made it abundantly clear in recent years that, in the course of interpreting a statute, a court is completely prohibited from adding language to that statute which the Legislature failed to include. *Omne Financial, Inc. v Shacks, Inc.*, 460 Mich 305, 311; 596 NW2d 591 (1999) ("nothing may be read into a statute that is not within the manifest intent of the Legislature as derived from the act itself."); *Lesner v Liquid Disposal, Inc.*, 466 Mich 95, 101; 643 NW2d 553 (2002) (the court is to apply the statute "as enacted without addition, subtraction or modification.") Thus, language cannot be added to §2912b(4) requiring the plaintiff to provide a "specific statement", "a detailed statement", "a complete statement", "a full statement" or "an accurate statement" of the six factors listed in that subsection.

With these preliminary discussions out of the way, plaintiff will address the question on which this Court remanded this case - whether the notice of intent to sue mailed in this case satisfied the requirements of §2912b(4).

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[8]It is, therefore, most important that this Court make clear that there is a fundamental difference between compliance with §2912b(4)'s six requirements and the altogether distinct question of whether the factual statements contained in a notice of intent to sue are accurate or sustainable. Compliance with the requirements of §2912b(4) does not depend on whether the plaintiff can ultimately present factual support for each of the six factors enumerated in §2912b(4). Thus, §2912b(4) does not contemplate that a circuit court, in addressing whether plaintiff's pre-suit notice complied with §2912b(4), will be saddled with the responsibility of conducting a mini-trial shortly after the Complaint is filed to determine whether the factual representations contained in the notice are objectively "accurate".

A. A Statement Of The Factual Basis Of The Claim.

Section 2912b(4)(a) requires a statement of "the factual basis for the claim." Both Mecosta County General Hospital and Dr. DesNoyers concede that the notice of intent to sue mailed to them complied with this subsection.

Dr. Atkins, however, contests whether Mrs. Roberts' notice complied with §2912b(4)(a). In doing so, Dr. Atkins appears to focus on the first paragraph of the September 23, 1996 notice of intent which describes events which occurred on October 4, 1994, when Mrs. Roberts was treated by Barb Davis and Dr. DesNoyers.[9] Atkins Brief, p. 10. In making this argument, Dr. Atkins is apparently asking this Court to disregard the one paragraph of the September 23, 1996 notice which mentions him:

> Over the course of the next few days, Claimant continued to experience pain and cramping and, on October 7, 1994, was seen at Mecosta County General Hospital by Dr. Michael Atkins. Claimant was told that the pain she was experiencing was cramps from the D & C she had done and was sent home.
>
> Notice, 9/23/96, ¶1 (App. 12a)[10]

Dr. Atkins also suggests that this paragraph does not comply with §2912b(4)(a) because the notice contained an inaccurate date. As Dr. Atkins points out, he examined

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[9]For reasons which are not altogether clear, Dr. Atkins also emphasizes in his Brief the fact that two earlier notices dated August 15, 1996 and September 17, 1996, which were mailed by Mrs. Roberts, made no mention of Dr. Atkins' involvement in her treatment. These earlier notices were not even sent to Dr. Atkins. Under these circumstances, it is not particularly surprising that Dr. Atkins is not mentioned in these earlier documents.

[10]As this paragraph indicates, the location of Dr. Atkins' treatment of Mrs. Roberts was identified as Mecosta County General Hospital. Dr. Atkins did, in fact, treat Mrs. Roberts at that hospital. (App. 1a - 5a). In light of this fact, it is puzzling, to say the least, that Dr. Atkins has argued in his brief that the September 23, 1996 notice of intent misidentified the location where Dr. Atkins treated Mrs. Roberts.

Mrs. Roberts at the Mecosta General Hospital Emergency Department during the early morning hours of October 8, 1994. The notice of intent indicates that Dr. Atkins treated Mrs. Roberts on October 7, 1994.

Mrs. Roberts fainted in her home on the night of October 7, 1994, and she had to be taken by ambulance to a hospital which was some distance away. By the time she was treated at that hospital by Dr. Atkins it was after midnight. Thus, there was some reason for the notice's designation of October 7, 1994 as the date in which Dr. Atkins treated Mrs. Roberts. However, regardless of the explanation for the factual inaccuracy contained in the notice, that inaccuracy cannot be the basis for concluding that Mrs. Roberts did not comply with §2912b(4)(a) with respect to her claim against Dr. Atkins. As discussed previously, §2912b(4)(a) requires only *a statement* of the factual basis for the claim; it does not require a complete statement of that factual basis, nor does it require a completely accurate statement of that factual basis. Compliance with §2912b(4)(a) is, therefore, dependent on whether the notice of intent to sue contains a statement of the factual basis for the plaintiff's claim; it does not depend on the entirely different question of whether that statement of the factual basis is objectively accurate.

Dr. Atkins fixation on a factual inaccuracy in Mrs. Roberts notice of intent to sue is particularly ludicrous in this particular case in light of the limited nature of his professional relationship with Mrs. Roberts. Mrs. Roberts has treated with Dr. Atkins only once in her life - during the early morning hours of October 8, 1994 at Mecosta County General Hospital. Upon receiving Mrs. Roberts' September 23, 1996 notice of intent to sue, Dr. Atkins could have located the five pages of hospital records which he has included in his Appendix (App. 1a - 5a) and determined almost immediately that he saw Mrs. Roberts

during the early morning of October 8, 1994 (not October 7, 1994) and he would have been able to determine precisely what he did in treating Mrs. Roberts on that date. Dr. Atkins, therefore, attempts to inflate the inaccuracy contained in the notice of intent presumably for the purpose of suggesting to this Court that this inaccuracy somehow made a difference to his pre-suit conduct. Yet, Dr. Atkins, like all of the defendants involved in this case, has never suggested that he was somehow unable to understand or determine the nature of Mrs. Roberts claim as reflected in her notices of intent. Thus, Dr. Atkins, like every other defendant in this case, has never asserted that the notices of intent mailed by Mrs. Roberts' counsel were inadequate to permit him to evaluate the case or to enter into pre-suit settlement negotiations if he chose to do so.

The fact is that Mrs. Roberts' September 23, 1996 notice of intent satisfied §2912b(4)(a)'s requirement that she include *a statement* of the factual basis for her claim against Dr. Atkins as well as the other defendants. That notice indicated that on October 4, 1994, Mrs. Roberts was determined to have suffered a spontaneous abortion and a D & C was performed. Three days later, after experiencing continuing pain and cramping, Mrs. Roberts went to Mecosta County General Hospital where she was seen by Dr. Atkins who determined that the symptoms she was experiencing were related to the D & C. Based on that diagnosis, Dr. Atkins released her. Mrs. Roberts had to return to Mecosta County General Hospital on October 8, 1994 when she was properly diagnosed as having an ectopic pregnancy. (App. 12a). This statement satisfies §2912b(4)(a)'s requirement of a statement of the factual basis for Mrs. Roberts' claim against Dr. Atkins.

Before proceeding to the remaining five factors listed under §2912b(4), the Court should consider the implications of the fact that Mrs. Roberts' notice contained a statement

of the factual basis for her claim which complied with §2912b(4)(a). Clearly, the factual basis for a claim of medical malpractice may encompass not only general background facts, but also other facts which are otherwise related to establishing such a claim, including such elements of a medical malpractice action as proximate cause and damages.

It bears repeating that §2912b(4) does not require a claimant to follow a particular format or include required "magical" language in a notice of intent to sue. What is required, instead, is *a statement* of the factors listed in §2912b(4). And, while there are six factors listed under §2912b(4), there is unquestionably some amount of overlap regarding these six factors. This is particularly true of §2912b(4)(a)'s requirement of a statement of the factual basis for claim - a requirement which can to encompass a number of potential elements of a claim for medical malpractice including the subdivisions of §2912b(4) which require the claimant to describe how the defendant breached the standard of care, §2912b(4)(c), how the defendant could have complied with the standard of care, §2912b(4)(d), and how the defendant's professional negligence resulted in injury to the claimant, §2912b(4)(e).

B. A Statement Of The Applicable Standard Of Practice.

Mecosta General Hospital and Dr. DesNoyers do not contest that Mrs. Roberts' notices contained a statement of the "applicable standard of practice or care alleged by the claimant," as required by §2912b(4)(b).

With respect to Dr. Atkins, the September 23, 1996 notice stated that he treated Mrs. Roberts within days after it had been determined that she had suffered a spontaneous abortion and a D & C had been performed. (App. 12a). Dr. Atkins determined that the

continuing symptoms which Mrs. Roberts was experiencing were due to the D & C. (*Id*). Dr. Atkins was wrong. Mrs. Roberts actually had an ectopic pregnancy. The notice characterized Dr. Atkins misdiagnosis of Mrs. Roberts' condition as negligence.

While Mrs. Roberts' notice does not use magic words such as "standard of care" or "standard of practice", the standard applied to Dr. Atkins' negligence is clearly conveyed. The standard of care required Dr. Atkins to diagnose and treat Mrs. Roberts' ectopic pregnancy when he treated her in the Mecosta General Hospital emergency room.

C. A Statement Of The Manner In Which It Is Claimed That The Standard Of Care Was Breached.

Section 2912b(4)(c) requires that a notice of intent to sue contain a statement of "the manner in which it is claimed that the applicable standard of practice or care was breached by the health professional or health facility." Each defendant claims that Mrs. Roberts' notices of intent to sue did not comply with this requirement.

As it pertains to Dr. DesNoyers, there can be no question that §2912b(4)(c) was complied with. Dr. DesNoyers has conceded that paragraph 2 of Mrs. Roberts' September 23, 1996 notice contains a statement of the applicable standard of practice alleged which satisfies §2912b(4)(b):

> 2. THE APPLICABLE STANDARD OF PRACTICE OR CARE ALLEGED
>
> Claimant contends that the applicable standard of care required that Obstetrics & Gynecology of Big Rapids, Dr. Gail DesNoyers and Barb Davis, PAC, provide the Claimant with the services of competent, qualified and licensed staff of physicians, residents, interns, nurses and other employees to properly care for her, render competent advice and assistance in the care and treatment of her case and to render same in

accordance with the applicable standard of care.

Notice 9/23/96, ¶2 (App. 12a).

This statement was immediately followed by this:

> 3. THE MANNER IN WHICH IT IS CONTENDED THAT THE APPLICABLE STANDARD OF PRACTICE OR CARE WAS BREACHED
>
> Claimant claims that Obstetrics / Gynecology of Big Rapids, Dr. Gail DesNoyers and Barb Davis, PAC, failed to provide her with the applicable standard of practice and care outlined n paragraph 2 above.

Notice 9/23/96, ¶3 (App. 13a).

Thus, there was clearly *a statement* in paragraph 3 of Mrs. Roberts' September 23, 1996 notice that Mrs. Roberts was claiming that Dr. DesNoyers breached the applicable standard of care by failing to comply with the standards as alleged in paragraph 2 of that notice. Whether that statement of how Dr. DesNoyers breached the standard of care is detailed, complete or even accurate is absolutely irrelevant to the question of whether the notice complies with §2912b(4)(c).[11] All that is required under the text of 2912b(4)(c) is that the notice of intent contain a statement of how the claimant claimed the standard of care

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[11]Plaintiff has previously noted that the introductory language to §2912b(4) does not contain the modifier "accurate" to describe the statements contained in a notice of intent to sue. Thus, objective accuracy is not a prerequisite to compliance under §2912b(4). There is, however, critical language in several of §2912b(4)'s subdivisions which also demonstrate that objective accuracy cannot be an essential prerequisite of a notice of intent to sue. Thus, subdivisions of §2912b(4) include the requirement of a statement of the applicable standard of care *as alleged* by the claimant, §2912b(4)(b), or the manner in which the plaintiff *claims* that the standard was breached, §2912b(4)(c), or the manner in which the claimant *alleges* that the potential defendant's negligence caused the injury which the plaintiff claims, §2912b(4)(e). Without question, this is not language which requires objective verifiability. Rather, it is language which bespeaks of a subjective approach, premised on what the claimant *alleges* or *claims*.

had been breached. There is unquestionably such a statement in Mrs. Roberts' notice as it pertains to Dr. DesNoyers.

There is an additional statement as to how Dr. DesNoyer breached the standard of care in the Factual Basis section of Mrs. Roberts' notice. That portion of the notice asserted that Dr. DesNoyers was negligent in diagnosing Mrs. Roberts as having had a spontaneous abortion and treating her accordingly. The notice clearly states that, contrary to Dr. DesNoyers' diagnosis, Mrs. Roberts had an ectopic pregnancy, not a spontaneous abortion. (App. 12a). In characterizing this misdiagnosis as negligence, the notice clearly provided that additional "statement" that Dr. DesNoyer had breached the standard of care by failing to properly diagnose Mrs. Roberts' condition.

Like Dr. DesNoyers, Mecosta County General Hospital does not contest that the notice of intent to sue served on it contained a sufficient statement as to the applicable standard of care for purposes of §2912b(4)(b). Mecosta County General Hospital does, however, contend that the notice did not comply with §2912b(4)(c).[12] Mrs. Roberts' notice which was mailed to Mecosta County General Hospital contained the following standard of care, which defendant acknowledges complied with §2912b(4)(b):

> 2. THE APPLICABLE STANDARD OF PRACTICE OR CARE ALLEGED
>
> Claimant contends that the applicable standard of care required that Mecosta County General Hospital provide

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[12]Mecosta County General Hospital does not elaborate as to why the notice does not comply with §2912b(4)(c). *See* Brief, pp. 7-8. This defendant merely concludes that, "*[l]ooking to the claims in plaintiff's Complaint*, it is clear that the notice did not address" §2912b(4)(c) (emphasis added). As noted previously, the contents of a plaintiff's complaint have no relevance to determining a claimants compliance with the requirements of §2912b(4). *See* fn. 6, *supra*.

> the Claimant with the services of competent, qualified and licensed staff of physicians, residents, interns, nurses and other employees to properly care for her, render competent advice and assistance in the care and treatment of her case and to render same in accordance with the applicable standards of care.
>
> Notice, 8/15/96, ¶2 (App. 7a).

This paragraph was immediately followed by this:

> 3. THE MANNER IN WHICH IT IS CONTENDED THAT THE APPLICABLE STANDARD OF PRACTICE OR CARE WAS BREACHED.
>
> See paragraph 2 above.
>
> Notice, 8/15/96, ¶3 (App. 8a).

By indicating that the manner in which Mecosta County General Hospital breached the applicable standard of practice was reflected in paragraph 2, the notice of intent clearly conveyed the fact that plaintiff was claiming that the Hospital breached the standards of care which were outlined in paragraph 2 of the notice. Thus, Mrs. Roberts' notice contains a statement of her claim as to the hospital.

As to Dr. Atkins, the notice states that he was responsible for negligence when he mistakenly concluded that Mrs. Roberts' continuing pain and cramping were caused by the D & C performed several days before. Mrs. Roberts, instead, had an ectopic pregnancy, which Dr. Atkins failed to diagnose. Mrs. Roberts' notice may not have mimicked the language of §2912b(4)(c) by using the words "breach" of "the applicable standard of care". Nevertheless, her claim as to how Dr. Atkins breached the standard of care was unmistakably conveyed. The standard of care compelled Dr. Atkins to diagnose Mrs. Roberts' ectopic pregnancy when she presented to him in the emergency room on October

8, 1994 and his failure to make that diagnosis constituted a breach of the standard of care.

D. A Statement Of The Alleged Action That Should Have Been Taken To Achieve Compliance With The Standard Of Care.

Section 2912b(4)(d) requires that a notice of intent contain a statement of "the alleged action that should have been taken to achieve compliance with the alleged standard of practice and care." It must again be emphasized that both Mecosta County General Hospital and Dr. DesNoyers concede that the August 15, 1996 and September 23, 1996 notices mailed by Mrs. Roberts' counsel contain a statement of the applicable standard of care which complies with §2912b(4)(b). After stating Mrs. Roberts' claimed standard of care, the notices provided the following:

> 4. THE ACTION THAT SHOULD HAVE BEEN TAKEN TO ACHIEVE COMPLIANCE WITH THE STANDARD OF PRACTICE OR CARE.
>
> See paragraph 2 above.
>
> Notice, 8/15/96, ¶4 (App. 8a)
> Notice, 9/23/96, ¶4 (App. 13a)

This reference to paragraph 2 of the notice represented the plaintiffs unequivocal statement that the action which Mecosta County General Hospital should have taken to achieve compliance with the applicable standard of care was to provide Mrs. Roberts with "the services of competent, qualified and licensed . . . physicians, residents, interns, nurses and other employees [and] to properly care for her, render competent advice and assistance in the care and treatment of her case." Notice 8/15/96, ¶2 (App. 7a).

Similarly, the September 23, 1996 notice, by referring in paragraph 4 to the standard of care provided in paragraph 2 clearly provided that Dr. DesNoyers could have achieved

compliance with the applicable standard of care by providing Mrs. Roberts "with the services of competent, qualified and licensed staff of physicians and residents, interns, nurses and other employees to properly care for her, render competent advice and assistance in the care and treatment of her case . . ." Notice 9/23/96, ¶2 (App 12a). This is sufficient to satisfy the requirements of §2912b(4)(d).

As the Court of Appeals properly noted, the notice contained additional explication of Mrs. Roberts' claims against Dr. DesNoyers. In paragraph 1 of her notice, Mrs. Roberts set out facts indicating that on October 4, 1994, Dr. DesNoyers erroneously diagnosed Mrs. Roberts as having suffered a spontaneous abortion and treated her for that condition when, in actuality, Mrs. Roberts had an ectopic pregnancy. Notice 9/23/96, ¶1 (App. 12a). By identifying Dr. DesNoyers' October 4, 1994 misdiagnosis as the factual basis for her claim, Mrs. Roberts' notice clearly conveyed the fact that it was her position that the action which Dr. DesNoyers should have taken to comply with the applicable standard of care was to properly diagnose and treat Mrs. Roberts' ectopic pregnancy when Dr. DesNoyers saw Mrs. Roberts on October 4, 1994.

With respect to Dr. Atkins, the notice states that he was negligent in failing to diagnose Mrs. Roberts' ectopic pregnancy. The notice clearly conveyed the fact that he was negligent in failing to make that diagnosis. Thus, the action which Dr. Atkins should have taken to comply with the standard of care is communicated in Mrs. Roberts' notice - he should have made the appropriate diagnosis of Mrs. Roberts' condition and treated her for an ectopic pregnancy.

E. A Statement Regarding Proximate Cause.

Section 2912b(4)(e) requires that the Notice of Intent contain a statement of "the

manner in which it is alleged the breach of the standard of practice or care was the proximate cause of the injury claimed in the notice." Both the August 15, 1996 notice to Mecosta County General Hospital and the September 23, 1996 notice to the remaining defendants contained a statement of how the professional negligence involved herein proximately caused injury to Mrs. Roberts. Both notices stated that the defendants had misdiagnosed an ectopic pregnancy as a spontaneous abortion. Notices, ¶1 (App. p. 7a; App. p. 12a). The notices further indicated that on October 8, 1994, upon returning to Mecosta General Hospital, a correct diagnosis was made, but by this time Mrs. Roberts' fallopian tube had burst and emergency surgery had to be performed to remove her left tube. The notices stated:

> Claimant had her right tube removed approximately ten years ago and, as a result of the negligence set forth above, she is now unable to have any children.
>
> Notice, 8/15/96, ¶1 (App. 7a);
> Notice 9/23/96, ¶1 (App. 12a).

These statements were more than adequate to satisfy §2912b(4)(e).

Again, it must be emphasized that §2912b(4)(e) does not condition compliance with this subdivision's requirement on whether the plaintiff's statement regarding proximate cause is, in fact, accurate.[13] All that is required is *a statement* of the manner in which claimant *alleges* that the defendants' negligence proximately caused injury. That is precisely what Mrs. Roberts' notices did.

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[13]It is, therefore, utterly irrelevant for purposes of §2912b(4)(e) whether plaintiff's claim as to how she was injured by the defendants' negligence is correct. What the claimant must provide is a statement of what she *alleges* to be proximate cause. Thus, Dr. DesNoyers ' observation that Mrs. Roberts may be able to conceive children in the future is entirely gratuitous for purposes of §2912b(4). *See* DesNoyers' Brief, p. 10.

Dr. DesNoyers contends in her brief that "the Notice of Intent must state more than simply "X" proximately caused "Y". This is absolutely incorrect. Textually, §2912b(4) requires only *a statement* of how, *according to the claimant's view of the case*, the defendants' negligence proximately caused injury to the claimant. There should be no question that such a statement was provided in Mrs. Roberts' notices.

F. A Statement Of Others Claimant Is Notifying.

Section 2912b(4)'s final requirement is a statement identifying "all health professionals and health facilities the claimant is notifying . . . in relation to the claim." §2912b(4)(e). All of the defendants have conceded that Mrs. Roberts' notices comply with this subsection.

II. IN DETERMINING WHETHER A NOTICE OF INTENT IS SUFFICIENT FOR TOLLING PURPOSES, THIS COURT SHOULD APPLY A SUBSTANTIAL COMPLIANCE STANDARD, OR AT LEAST SHOULD ESCHEW AN OVERLY TECHNICAL CONSTRUCTION OF STATUTORY REQUIREMENTS IN LIGHT OF THIS CONTEXT IN WHICH NOTICE IS GIVEN.

For the reasons discussed in Issue I, *supra*, this Court should conclude that Mrs. Roberts' notices complied with each of the requirements of §2912b(4). However, in its order granting leave to appeal in this matter, the Court specifically requested the parties to brief "whether strict compliance or some lesser standard of compliance applies to plaintiff's notice of intent . . ." (App. 228a).

The question of a party's compliance with a statutory pre-suit notice requirement has been addressed by this Court on a number of prior occasions. In these cases, this Court has adopted the view that a plaintiff will not be foreclosed from pursuing a cause of action based on the operation of a pre-suit notice statute provided there has been "substantial

compliance" with that notice provision. *Meredith v City of Melvindale*, 381 Mich 572, 579; 765 NW2d 7 (1969); *Pearll v City of Bay City*, 174 Mich 643, 647; 140 NW 938 (1913); *Ridgeway v City of Escanaba*, 154 Mich 68, 70; 117 NW 550; *Brown v City of Owosso,* 126 Mich 91; 85 NW2d 256 (1901); *Swanson v City of Marquette,* 357 Mich 424, 431-432; 98 NW2d 574 (1959).

In these cases, the Court has eschewed an overly technical construction of notice content requirements as long as the notice given by the plaintiff provides a significant amount of the basic information that the statute requires and is sufficient to serve the underlying purposes of the statute. This has been true in a variety of contexts with respect to almost all of the notice requirements which Michigan courts have considered. *See, e.g., Hummel v City of Grand Rapids*, 319 Mich 616; 30 NW2d 372 (1948) (former 1 Comp. Laws 1929 §4230 - requiring notice of injury to municipality specifying location and nature of defect, description of injury sustained, and names and addresses of known witnesses); *Meredith, supra* (city charter provision requiring notice of claim by advising of location and nature of defect, injury sustained, names of witnesses and facts concerning happening of accident); *Jackson v City of Detroit Bd of Education*, 18 Mich App 73; 170 NW2d 489 (1969) (MCL 691.1401 - requiring notice within 60 days of injury to responsible governmental agency specifying "exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant), *Lansing General Hospital v Gomez*, 114 Mich App 814; 319 NW2d 683 (1982) (construing MCL 500.3145(1) - written notice provision of no-fault statute requiring notice to insurer specifying name and address of claimant, name of person injured, and time, place and

nature of injury, within one year of accident to toll statute of limitations.), *Federated Publications, Inc. v Board of Trustees of Michigan State University*, 221 Mich App 103; 561 NW2d 433 (1997) (Open Meeting Act requirements for timing and posting of notices regarding meeting.) *Family Independence Agency v Conselya*, 245 Mich App 181; 628 NW2d 570 (2001); (notice requirements of Indian Child Welfare Act regarding termination of parental rights).

In all of these cases, the critical touchstone for the courts' "substantial compliance" rulings has been the underlying purpose of the statutory notice provisions. The courts have been reluctant to deprive an injured party of his or her day in court based on a technically defective pre-suit notice where the defect did not prejudice the defendants and was sufficient to serve the underlying purposes of the statute. *Hummel, supra* at 624-625; *Meredith, supra; Dozier v State Farm Mutual Ins. Co.*, 95 Mich App 121; 290 NW2d 408 (1980).

While, as defendants argue, the purpose of the notice statutes in some of these cases may have been different than the purpose behind §2912b, the rationale these courts have employed in adopting a substantial compliance test is wholly applicable to the present case. The courts' basic concern has been that a notice provision should not be so strictly and technically applied as to needlessly eradicate meritorious claims where the notice provided was actually sufficient to serve the purpose of the underlying statute, whatever that purpose might be.

If this Court were to follow its prior decisions in *Meredith, Swanson, Pearll* and *Ridgeway*, there would be no doubt as to the outcome of this case. Even the defendants

have conceded that the purpose of the notice of intent to sue and the mandatory pre-suit waiting period called for by §2912b is to give the parties a time period prior to the filing of suit in which they can attempt to resolve the case. Thus, as the defendants have asserted throughout their briefs, the purpose behind the notice requirement is to provide the defendant with the requisite information about the plaintiff's claim so that meaningful pre-suit decisions regarding potential settlement can be made.

In this case, there has never been any claim by the defendants that they were unable to engage in consideration of, or negotiation of, a settlement due to any alleged deficiencies in Mrs. Roberts' notices of intent, or that they would have attempted to settle the case, but for the alleged deficiencies. Nor could such a claim be persuasively made. The notices provided defendants with more than sufficient information to evaluate the nature and strength of the claims against them.

Indeed, there is considerable force to the argument that an overly technical construction of MCL 600.2912b would serve to undermine the Legislative goal of encouraging pre-suit settlement of medical malpractice claims. The reason for this lies in the mechanism by which §2912b's requirements are "enforced." As this case demonstrates, compliance with the requirements of §2912b is of critical importance in light of the fact that a plaintiff is compelled by that statute to wait a substantial period of time before filing a medical malpractice suit. In many cases,[14] that statutory waiting period

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[14]Plaintiff would suggest that *most* medical malpractice cases follow the pattern of this case in which resort to the tolling provision contained in §5856(d) is necessary. The period of limitations in a medical malpractice action is either two years from the date of the malpractice, MCL 600.5805(6), or six months from the date of discovery of the malpractice. MCL 600.5838a. Obviously, every case covered by the discovery limitations period must utilize §5856d's tolling provision since the mandatory waiting

extends beyond the period of limitations. The Legislature was, of course, aware of the fact that the mandatory waiting period required under §2912b would often extend beyond the statute of limitations and, as a result, enacted a tolling provision, MCL 600.5856(d).

What the defendants argued in the circuit court is that Mrs. Roberts' notice of intent to sue did not fully comply with §2912b(4) and, as a result, she could not claim the benefit of the §5856(d)'s statutory tolling provision. Because of the mandatory waiting period imposed on the plaintiff under §2912b, by the time the defendants filed their motions challenging Mrs. Roberts' notices of intent, there was nothing that plaintiff could do to correct any inadequacies in the notices. Thus, the remedy which the defendants sought in the circuit court was complete victory - dismissal of plaintiff's entire claim on the basis of the statute of limitations.

While the dispute between the parties in this case centers on the adequacy of Mrs. Roberts' pre-suit notice of intent to sue under §2912b(4), what is really at stake is whether her cause of action will be deemed timely filed. The implications of a defective notice of intent are, therefore, of overwhelming importance - if found to be defective the defendant is awarded summary disposition on the basis of the statute of limitations in every case in which the notice of intent was sent with less than six months remaining on the limitations period.

It is predictable what will happen in the future under such a system. The potential

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period required by §2912b is also six months. With respect to claims governed by the two year statute of limitations, by the time the plaintiff consults an attorney, all relevant medical records are obtained and pre-notice investigation of a potential malpractice claim is completed, there is often less than six months remaining on the statute by the time the notice of intent to sue is prepared. In such circumstances, the plaintiff must claim the tolling provision of §5856b(d) if his/her claim is to be timely.

"benefit" to a defendant associated with challenging a notice of intent is so great that motions to find a notice of intent to be defective will become commonplace. The incentive for a defendant to proceed on this course would be overwhelming since the end result will be complete success for the defendant. But, to proceed on such a course, the defendant would have to sit back during the pre-suit notice period and, rather than attempting to settle the case, merely await the filing of the complaint to raise the question of the adequacy of the notice of intent. The end result of a strict construction of §2912b(4)'s requirements would, therefore, act as a disincentive to pre-suit settlement. There can be no serious question that a substantial compliance approach to §2912b(4) would better serve the apparent legislative purpose behind the pre-suit notice of intent to sue.

Having put forth the prior case law from this Court endorsing a substantial compliance approach to statutory pre-suit notices of suit, plaintiff must concede that she is not particularly sanguine about the prospects of this Court embracing a substantial compliance test similar to the one that was adopted in such cases as *Meredith* and *Swanson*. In *Meredith* and *Swanson* the Court held that, where the purpose of the statutory notice was fully served, strict adherence to the literal text of the statute was not required. Thus, in these cases, despite the fact that a statutory notice provision required the claimant to notify a potential defendant of various facts associated with an accident, this Court held that a notice which did not contain each of these facts could still satisfy the notice statute under substantial compliance standard since the purpose of the notice statute was fully served by the notice.

In light of recent case law emanating from this Court, *e.g. Roberts, supra; Omne Financial, Inc. v Shacks*, 460 Mich 305, 311; 596 NW2d 591 (1999); *Robertson v Daimler*

Chrysler Corp, 465 Mich 732, 748-751; 641 NW2d 567 (2002), plaintiff assumes that this Court's approach to a pre-suit notice statute would be quite different. Based on this Court's recent precedents, it would appear to be far more likely that this particular Court would conclude that whether the "purpose" of the §2912b(4) notice requirement has been served is irrelevant; what is relevant is compliance with the literal text of that subsection.[15]

Plaintiff, therefore, anticipates that this Court will not be persuaded by such cases as *Meredith* and *Swanson* and hold that §2912b(4) has been substantially complied with if some, but not all of the requirements specified in §2912b(4) have been satisfied. Nevertheless, there is, in plaintiff's view, a method of adhering to the literal requirements of §2912b(4) while at the same time recognizing that, in determining whether those literal requirements have been complied with, a court must construe the notice liberally.

To begin with the obvious, the notice of intent required by §2912b(4) is a notice of the fact that the plaintiff *intends to sue* the hospitals or physicians to whom such notices are sent. Thus, when Mrs. Roberts' counsel sent notices under §2912b to the various defendants, those defendants had to be aware of the fact that Mrs. Roberts intended to

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[15]As plaintiff has attempted to explain in Issue I of this brief, this interplay between the legislative purpose behind §2912b(4) and the literal language of that subsection works in more than one way. If this Court concludes that a substantial compliance test cannot be adopted because the "purpose" behind §2912b(4) cannot override the literal text of that subsection, the Court must be equally careful to avoid a result urged by the defendants, *i.e.,* that the "purpose" behind §2912b(4) somehow infuses that subsection with additional requirements which simply are not contained in its text. In other words, assuming that plaintiff is not successful in a "substantial compliance" test patterned after such cases as *Meredith* and *Swanson*, the defendants likewise cannot be successful in suggesting that the only way that the "purpose" behind §2912b(4) can be served is if the statements contained in a notice of intent are "detailed", "complete" and "accurate". The Court must understand that both of these approaches elevate perceived legislative purpose over the statutes' literal text and, if one is wrong, both are wrong.

sue them over the events which were described therein. Since, doctors do not get sued for professional conduct which the patient assesses to be adequate or in conformance with the applicable standard of care, receipt of Mrs. Roberts' notice of intent to sue also informed each of the potential defendants that Mrs. Roberts at least believed that the defendants had been responsible for professional negligence in conjunction with the incidents which were described in her notice.

It is also worth emphasizing at this point that the notice required by §2912b is mailed to licensed physicians and/or licensed health care facilities. The notice is, therefore, sent to people or entities possessing some level of medical sophistication. The people to whom the notice is sent, *i.e.* the people who are supposed to act on that notice, are presumably not neophytes with respect to the various factors covered by §2912b(4)(a)-(e). They are, presumably, somewhat versed in their own standard of care and, once the factual basis for the claimant's claim is proffered to them, should also be somewhat knowledgeable as to how that standard of care may have been breached, how that standard could have been met and the injuries that could potentially be caused by that breach. It can, therefore, be said that the notice of intent to sue is addressed to a sophisticated audience.

In addressing whether a notice of intent to sue satisfies the requirements of §2912b(4), plaintiff would urge this Court to consider the context in which such a notice is sent. Plaintiff would further suggest that, once the entire context of such a notice is considered, this Court should arrive at the conclusion that, in assessing whether the notice satisfies the six requirements of §2912b(4), the notice must be liberally construed in determining whether those requirements have been satisfied.

Consider, for example, the September 23, 1996 the notice sent to Dr. Atkins. Upon

receiving that notice, Dr. Atkins, even without reading the text of that document, would have been able to conclude that a patient whom he had treated intended to sue him for professional negligence. The patient identified in the notice was Mrs. Roberts, an individual whom Dr. Atkins had treated only once in his medical career.

The notice mailed to Dr. Atkins indicated that, before Mrs. Roberts saw him in October 1994, she had been to another doctor for problems during a pregnancy and she had been diagnosed as having had a spontaneous abortion. A D & C had been performed and Mrs. Roberts had been released. After her release, Mrs. Roberts continued to experience symptoms of abdominal pain and cramping. It was at this point that Mrs. Roberts went to Mecosta General Hospital where she was treated by Dr. Atkins. Dr. Atkins, according to the notice, advised Mrs. Roberts that her symptoms were the result of the D & C and he sent her home.

The notice goes on to state that the following day[16] Mrs. Roberts had to return to Mecosta General Hospital where it was finally determined that she had an ectopic pregnancy and emergency surgery was necessary to remove her left tube.

This notice of intent to sue addressed as it was to a person of some medical sophistication, conveyed each of the six factors itemized §2912b(4). The notice's factual basis of Mrs. Roberts' claim against Dr. Atkins, while admittedly brief, was commensurate with the limited character of the professional relationship that existed between these two. Mrs. Roberts had seen Dr. Atkins on only one occasion during which, according to the

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[16]The medical records indicate that it was, in fact, the same day that Dr. Atkins treated plaintiff, October 8, 1994, that Mrs. Roberts had to return to Mecosta General Hospital.

medical records, she arrived at the hospital at 1:50 a.m. and was discharged by Dr. Atkins less than two hours later, at 3:35 a.m. (App. 1a). In short, not much happened in the 1 hour and 45 minutes that Mrs. Roberts was at the Mecosta County General Hospital on the morning of October 8, 1994, other than the fact that Dr. Atkins mistakenly diagnosed her as suffering from abdominal pain due to a D & C (App. 2a), instead of what she actually had, an ectopic pregnancy.

By sending a notice of her intent to sue Dr. Atkins arising out of this incident and characterizing his treatment of her as "negligence", the "applicable standard of care" required by §2912b(4)(b) was conveyed. The applicable standard of care was that Dr. Atkins, as a licensed emergency room physician, was required to make the proper diagnosis of Mrs. Roberts' condition when she presented to him on October 8, 1994. The notice unquestionably conveys the fact that, by diagnosing Mrs. Roberts as suffering from "abdominal pain", Dr. Atkins missed the appropriate diagnosis, an ectopic pregnancy. Thus, there is in Mrs. Roberts' notice an unmistakable indication of how Dr. Atkins breached the standard of care for purposes of §2912b(4)(c) - he failed to diagnosis Mrs. Roberts' ectopic pregnancy. Moreover, what Dr. Atkins should have done to comply with the standard of care is equally obvious. He should have properly diagnosed Mrs. Roberts' condition when she presented to him for treatment. Finally, the notice also set forth the damages that Mrs. Roberts sustained as a result of Dr. Atkins' misdiagnosis; her last functioning fallopian tube burst and had to be removed. As a result, she can no longer have children.

The point of all of this is that properly construed, Mrs. Roberts' notice directed to the negligence of Dr. Atkins, a physician who had seen Mrs. Roberts only once and for a very

limited time and purpose, adequately conveyed each of the factors identified in §2912b(4). In considering whether Mrs. Roberts' notice "substantially complied" with §2912b(4)(a)-(e), what should be determinative is whether, from the standpoint of a reasonably sophisticated recipient or such a notice, each of these factors is conveyed in the notice.

For the foregoing reasons, plaintiff would ask that, in the event that this Court rejects the substantial compliance approach reflected in such cases as *Meredith* and *Swanson*, it conclude that, in assessing whether the plaintiff has complied with the requirements of §2912b(4), the claimant's notice of intent to sue must be liberally construed.

III. PER THE STATUTORY DEFINITION OF "COMPLIANCE" CONTAINED IN MCL 600.2912b(2), THE PLAINTIFF'S NOTICE OF INTENT WAS IN COMPLIANCE WITH §2912b AND THEREFORE TOLLED THE STATUTE OF LIMITATIONS.

As discussed in the prior section of this brief, Mrs. Roberts' case was not dismissed by the circuit court directly as a result of her failure to comply with §2912b(4). Rather, Mrs. Roberts' case was dismissed based on the expiration of the limitations period. Because Mrs. Roberts was compelled by §2912b to delay the filing of her case until the statutorily prescribed waiting period expired, the timeliness of her complaint was entirely dependent on the tolling provision contained in §5856(d). That tolling provision states as follows:

> The statutes of limitations or repose are tolled:
>
> * * *
>
> (d) If, during the applicable notice period under section 2912(b), a claim would be barred by the statute of limitations or repose, for not longer than a number of days equal to the number of days in the applicable notice period after the date notice is given in compliance with section 2912b.
>
> MCL 600.5856b(d).

What the defendants have argued throughout these proceedings is that §5856b(d)'s tolling provision is dependent on "compliance with" §2912b(4)'s requirements and, since (in their view) Mrs. Roberts' notices are not in compliance with §2912b(4), there can be no tolling under §5856(d). The defendants' arguments regarding the operation of §5856(d)'s tolling provision are completely unsupportable in light of the unequivocal text of §2912b. For these reason, the defendants' tolling argument must be rejected.

The Legislature has specifically decreed that tolling is to take place under §5856(d) if a notice of intent is sent "in compliance with" 2912b. The defendants have insisted that "compliance" for purposes of §5856(d) is to be determined on the basis of the plaintiff's compliance with the various factors under §2912b(4). The defendants' argument that there can be no tolling in this case completely ignores that fact that the Michigan Legislature has explicitly chosen to define what constitutes "compliance with" §2912b. That explicit statement of what constitutes compliance with §2912b is contained in §2912b(2), which states, "*Proof of the mailing* [of the notice of intent] *constitutes prima facie evidence of compliance with this section.*" *Id* (emphasis added).

It is notable that throughout §2912b, the Legislature distinguishes between "sections" of that statute and "subsections" or "subdivisions" of that statute. Indeed, the terms "subsection" or "subdivision" are mentioned at least seven times in §2912b. *See* §2912b(2), (3), (3)(b), (3)(c), (3)(d), (5), (8). Thus, the text of §2912b(2) does *not* specify that compliance with that particular *subsection* is based on a proof of mailing. Rather, §2912b(2) explicitly states that compliance *with the entirety of §2912(b)* is premised on a proof of mailing. By the unequivocal language contained in §2912b(2), Mrs. Roberts'

notice was "in compliance" with that provision. As such, she cannot be denied her right to claim the tolling provision contained in §5856(d).

Perhaps the most fundamental principle of statutory construction is that "when a statute specifically defines a particular term, that definition alone controls." *Tryc v Michigan Veteran's Facility*, 451 Mich 129, 136; 545 NW2d 642 (1996); *Vargo v Sauer*, 457 Mich 49, 58-59; 576 NW2d 656 (1998). In this case, the tolling statute operates if notice of intent to sue is given "in compliance with" §2912b, and §2912b explicitly defines what constitutes compliance. This Court is compelled to follow the unequivocal definition of "compliance" which the Michigan Legislature has chosen to provide in §2912b(2). Applying the literal language of §2912b(2) this Court must conclude that Mrs. Roberts is entitled to claim the tolling provision provided in §5856(d) precisely because she did what was necessary under §2912b(2) to comply with §2912b.

This Court has emphasized repeatedly in recent years that where a statute's language is clear, "we assume that the Legislature intended its plain meaning, and we enforce the statute as written." *Omelenchuck v City of Warren*, 466 Mich 524, 528; 647 NW2d 493 (2002); *Wickens v Oakwood Healthcare System*, 465 Mich 53, 60; 631 NW2d 686 (2001). This Court has further indicated that statutes must be interpreted as written and no part of a statute may be rendered nugatory or treated as surplusage. *State Farm v Old Republic*, 466 Mich at 146; *Robertson*, 465 Mich at 748; *Klapp v United Insurance Group Agency, Inc.*, ___ Mich ___; 663 NW2d 447 (2003). The Court must, therefore, give effect to the clear language of §2912b(2) and it must conclude that Mrs. Roberts can, under the circumstances of this case, claim the benefit of the tolling provision contained

in §5856(d).

Plaintiff acknowledges that applying the literal language of §2912b(2) to the tolling provision found in §5856(d) renders a result which may be at odds with portions of a decision which this Court rendered the first time this case was before it. *Roberts*, 466 Mich at 67-68. In *Roberts*, the majority held that "compliance with §2912b" for purposes of §5856(d) included compliance with all of the requirements of §2912b(4). Obviously, in rendering this ruling, the *Roberts* Court failed to consider the provision regarding compliance specifically contained in §2912b(b)(2). Nevertheless, this Court should have little hesitation in overruling *Roberts*.

This Court has in recent years established a considerable facility for overruling prior Supreme Court precedent regarding the interpretation of statutes, where those prior precedents interpreted statutes in a manner which cannot be harmonized with the literal text chosen by the Michigan Legislature. *See Sington v Chrysler Corp*, 467 Mich 144, 167, n. 15; 648 NW2d 624 (2002) (tabulating eleven cases rendered since July 1999 in which prior Supreme Court precedents on the interpretation of statutes have been overruled by this Court); *See also Mack v City of Detroit*, 467 Mich 186, 224, n. 9; 649 NW2d 47 (2002) (J. Cavanaugh, dissenting). The Court should add its decision in *Roberts* to this growing list. The Court should hold, on the basis of the unequivocal language of §2912b(2) that *Roberts* was incorrectly decided at least insofar as it held that Mrs. Roberts could not claim the tolling provision of §5856(d), and it should overrule those portions of that opinion which suggest otherwise.

IV. APPLICATION OF MCL 600.5856(d) TO DEPRIVE PLAINTIFF OF HER CLAIM ON STATUTE OF LIMITATIONS GROUNDS VIOLATES HER DUE PROCESS RIGHTS UNDER THE STATE AND FEDERAL CONSTITUTIONS.

A question concerning the constitutional validity of statute is reviewed *de novo. Taylor v Smithkline Beecham Corp*, 468 Mich 1, 5; 658 NW2d 127 (2003). If possible, this Court is obliged to construe statutes in a manner that would avoid a finding of constitutional invalidity. *Schwartz v Secretary of State*, 393 Mich 42, 50; 222 NW2d 517 (1974), *Nunn v George A Cantrick Co, Inc,* 113 Mich App 486, 491; 317 NW2d 331 (1982). Yet, if this Court opts for a ruling that "strict" compliance with MCL 600.2912b(4) is required to toll the statute of limitations under MCL 600.5856(d) and finds that plaintiff's claim is barred by the statute of limitations under such a standard, this Court will be required to find that the statutory scheme is violative of plaintiff's due process rights under the Michigan and United States Constitutions. Accordingly, this Court's construction of the word "compliance" in MCL 600.5856(d) should be tailored to avoid such an unconstitutional result, or the statute should be declared invalid as applied to this case.

The Due Process clauses of both the United States and the Michigan Constitutions (US Const, Am XIV; Const 1963, art 1, §17) provide that no person may be deprived of life, liberty or property without due process of law. These provisions guarantee that the government will not deprive an individual of life, liberty or property interests without providing appropriate procedural safeguards. *Electro-Tech, Inc v HF Campbell Co,* 433 Mich 57, 66 fn 9; 445 NW2d 61 (1989). They also protect property rights from interference through the arbitrary and capricious exercise of legislative authority. *Grubaugh v City of St Johns*, 384 Mich 165, 174-175; 180 NW2d 778 (1970), *Reich v State Highway Dept*,

386 Mich 617, 621-622; 194 NW2d 700 (1972).

It is well settled that an accrued cause of action, such as the malpractice claim in the present case, is a vested property interest subject to due process protection. *Grubaugh*, *supra* at 170,174; *Logan v Zimmerman Brush Co*, 455 US 422, 431-433; 102 S Ct 1148, 1155-1156 (1982). Both the Michigan and federal courts have also recognized that the right of access to the courts is a fundamental property right that falls within the parameters of the protection afforded by the Due Process clauses. *Logan*, 455 US at 429-430 and fn 5; *Forest v Parmalee*, 402 Mich App 348, 359; 262 NW2d 653 (1978). As the Supreme Court explained in *Logan*,

> [t]he Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances. ... Similarly, the Fourteenth Amendment's Due Process Clause has been interpreted as preventing the States from denying potential litigants use of established adjudicatory procedures, when such an action would be 'the equivalent of denying them the opportunity to be heard upon their claimed right[s].' *Boddie v. Connecticut*, 401 U.S. 371, 380, 91 S. Ct. 780, 787, 28 L.Ed.2d 113 (1971).

Id. While the State has a clear interest in fashioning its own rules of tort law, that interest is subordinate to the individual's interest in being protected from state action that is arbitrary or irrational. *Logan*, *supra* at 433. Similarly, although the legislature may elect not to confer a cause of action, once it does so, it cannot constitutionally authorize the deprivation of that property interest without appropriate procedural safeguards. *Id*, at 433. Here, as set forth in the following paragraphs, construction of the tolling provision and notice requirement in the manner advocated by the defendants, to bar plaintiff's claim on statute of limitations grounds, would offend this constitutional due process assurances by

depriving plaintiff of the opportunity to have her malpractice claim heard on the merits, and in effect stripping her of that property interest in a arbitrary and unjust manner, without even minimal procedural safeguards.

While this Court must begin with the presumption that a statute is constitutional (*Taylor, supra* at 6), in this case that presumption is clearly overcome when due process standards are applied to analyze the effect of the statutory scheme. "'Due process in civil cases generally requires notice of the nature of the proceedings, an opportunity to be heard in a ***meaningful time and manner***, and an impartial decisionmaker.'" *Traxler v Ford Motor Co*, 227 Mich App 276, 288; 576 NW2d 398, quoting *Cummings v Wayne County*, 210 Mich App 249, 253; 533 NW2d 13 (1995). *See also*, *Logan*, *supra* at 437 ("What the Fourteenth Amendment does require, however, 'is "an *opportunity* ... granted at a meaningful time and in a meaningful manner," (citation omitted)"for [a] hearing appropriate to the nature of the case".) (emphasis per original).

Under defendant's urged construction, the statutory scheme at issue here violates this due process guarantee because it operates to deprive a plaintiff of access to the courts on a medical malpractice claim without affording an opportunity to be heard at a "meaningful time" or in a "meaningful manner". Defendants' argument depends on a confluence of three statutes: §2912b(4) (the content requirements for the notice of intent), MCL 600.5805(6) (the two-year statute of limitations applicable to medical malpractice claims), and MCL 600.5856(d) (the tolling provision that applies when a notice of intent is mailed within 182 days of the running of the statute of limitations). Defendants claim that if a notice of intent does not accurately and completely meet every requirement of

§2912b(4), a plaintiff who mails such a notice within 182 days of the expiration of the statute of limitations does not get the benefit of the tolling provision set forth in §5856(d). Even if the notice provides the defendant with a substantial amount of the requisite information and the defendant understands the factual circumstances and nature of the claim it will be called to defend against, there is still no tolling and the statute of limitations continues to run during the notice period. Under defendants' proffered construction, even a notice that is not in "strict" compliance with §2912b(4) because of some unintended clerical error would not serve to toll the statute of limitations.

Thus a plaintiff is placed in a no win position. Because of the mandatory 182 day waiting period established in §2912b(1), she cannot successfully file her claim within the limitations period and toll the statute by such filing and service (MCL 600.5856(a)), or filing and placing the complaint in the hands of an "officer" for service (MCL 600.5856(c)). Her right of access to the courts is blocked until she fulfills the requirement of giving notice.

Further, because no case has yet been filed, a plaintiff does not have access to the court's to obtain a determination of whether her notice "complies" with §2912b(4) such that §5856(d) will toll the statute of limitations during the waiting period. It is only ***after*** the limitations period has potentially expired, and the plaintiff is able to file her lawsuit, that the defendants challenge her notice as "noncompliant" and thereby assert their claim that the statute of limitations has run. *Roberts v Mecosta County General Hospital,* 466 Mich at 67.

Even if the plaintiff has contact with the defendants or their insurance companies during the notice period and is led to reasonably believe that there is no problem with her notice, she cannot be assured that a defendant will not challenge the sufficiency of the notice once the lawsuit is filed. *Id.* Indeed, if this Court holds that "strict" compliance with

§2912b(4) is required for tolling to apply, it will virtually assure that in any case where a defendant can make any colorable claim whatsoever that the notice does not "comply", it will do so. Even in a meritorious case, the defendants have no motivation to seek to resolve the claim by settlement during the notice period if it can make an argument that the notice is technically defective and potentially avoid all liability.[17]

Once the 182 day waiting period expires, the plaintiff can then file her case, but at that point it is subject to a motion to dismiss under MCR 2.116(C)(7) on statute of limitations grounds. At that time, probably for the first time (as in this case), the plaintiff learns that the defendants believe her notice does not fully comply with the §2912b(4). If the trial court agrees with the defendant, there is nothing plaintiff can do. Her claim is already time-barred. The statute of limitations expired during the waiting period because her notice did not serve to toll it. There is no mechanism to amend the notice or turn back the clock.

In sum, there is no opportunity for a hearing at a "meaningful time" because by the time the issue is even required to be raised, the plaintiff's right of access to the courts on her claim is gone. There is no opportunity for a hearing in a "meaningful manner" because the issue is not determined until after the fact, when the limitations period has already expired and there is no mechanism giving a plaintiff the opportunity or ability to cure any

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[17]The legislative history supports and our courts have recognized that the purpose of the notice of intent statute is to promote dialogue between the parties that could lead to pre-litigation settlement, not to create a potential procedural trap that would require the dismissal of a later-filed lawsuit based on then-perceived inaccuracies in the notice of intent. *See, Omelenchuk v City of Warren*, 461 Mich 567, 576, fn19; 609 NW2d 177 (2000), *Neal v Oakwood Hospital Corp*, 226 Mich App 701, 719; 575 NW2d 68 (1998), House Legislative Analysis Section, *Analysis of Senate Bill 270 and House Bills 4033, 4403, and 4404*, "Advanced Notice of Suit", p 3.

alleged insufficiency.

Contrast this situation with what occurs when a defective complaint is filed. In every malpractice action in which the mandatory waiting period expires before the limitations period, such that the plaintiff can actually file her lawsuit within the 2-year statutory time frame, as well as in cases outside the medical malpractice area where there is no notice of intent requirement, the fact that a complaint is defective at the time of filing does not prevent the tolling of the statute of limitations. Under MCR 2.118(D), the plaintiff can amend to cure substantive defects, or even to add claims arising from the same transaction or occurrence after the statute of limitations has expired and the amended allegations will relate back to the date of filing. The claims will not be time barred. *Doyle v Hutzel Hospital*, 241 Mich App 206, 212-213; 615 NW2d 759 (2000). This Michigan court rule, and its federal counterpart, Fed R Civ P 15, were crafted specifically in recognition of the fact that any other result would be unduly harsh and unjust. *LaBar v Cooper*, 376 Mich 401, 405-407; 137 NW2d 136 (1965), *Weymers v Khera*, 454 Mich 639, 657-658 and fn 27; 563 NW2d 647 (1997). A plaintiff should not be deprived of her day in court based on a pleading error where the defendant had notice of the claim within the limitations period, and the policy behind the statute of limitations has been satisfied.[18]

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[18]Other court rules reflect this same policy. *See, e.g.*, MCR 2.102(C) which provides:"At any time on terms that are just, a court may allow process or proof of service of process to be amended ... . An amendment relates back to the date of the original issuance or service of process unless the court determines that relation back would unfairly prejudice the party against whom the process issued." In *Barber v Touhy*, 33 Mich App 169; 189 NW2d 722 (1971), the Court of Appeals applied the predecessor of this rule to hold that where the summons and complaint in an auto negligence case were served on the Secretary of State and mailed to the nonresident defendants by registered mail, but the plaintiffs failed to include in the mailing to defendant the required notice that the Secretary of State had been served, the plaintiff could cure the

> The doctrine of "relation back" was devised by the courts to associate the amended matter with the date of the original pleading, so that it would not be barred by the statute of limitations. ... The test is no longer conceptual, but rather functional. The amendment relates back to the date of the original pleading and, therefore, is not barred by limitations, whenever the claim or defense asserted in the amendment arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading. It is thus beside the point that the amendment introduces new facts, a new theory, or even a different cause of action, so long as it springs from the same transactional setting as that pleaded originally. ***The new test satisfies the basic policy of the statute of limitations, because the transactional based of the claim must still be pleaded before the statute runs, thereby giving defendant notice within the statutory period that he must be prepared to defendant against all claims for relief arising out of that transaction.***'

LaBar, *supra* (emphasis per original). *See also*, *Siegel v Converters Transportation, Inc*, 714 F2d 213, 216 (CA 2, 1983) ("The purpose of Rule 15 "is to provide a maximum opportunity for each claim to be decided on its merits rather than on procedural technicalities.")

The defendant's urged application of the statutory scheme creates precisely the harsh injustice that the pleading amendment and relation back rules were designed to abrogate. The plaintiff's claim is dismissed as time-barred, despite the fact that the defendant received notice of the claim within the statutory period and the underlying purpose of the statute of limitations is in no way furthered by the dismissal.

Thus, it is of critical importance for this Court to remain cognizant of the fact that the basis for dismissal of this claim was that the statute of limitations had expired. (183a-

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defect by mailing the notice and the mailing would be deemed to relate back to filing, before the expiration of the statute of limitations. The court reasoned that because there was substantial compliance within the limitations period and the defendant had notice of the pendency of the lawsuit, it would have been unjust to dismiss the case with prejudice.

184a, 180a-191a). While it was the plaintiff's alleged failure to comply with the notice content requirement that led to this result, this case was ***not*** dismissed on grounds that plaintiff failed to comply with the notice requirement.[19] This case was dismissed because the trial court found that the plaintiff could not claim the benefits of the tolling provision, and therefore her claim was time-barred -- a dismissal with prejudice.

Looking at the objectives that the legislature seeks to achieve when it enacts a statute of limitations, it becomes evident that these purposes are not furthered by dismissal in this case.

> Statutes of limitation are procedural devices intended to promote judicial economy and the right of defendants. For instance, they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence. They also prevent plaintiffs from sleeping on their rights; a plaintiff who delays bringing an action profits over an unsuspecting defendant who must prepare a defense long after the even from which the action arose.

Stephens v Dixon, 449 Mich 531, 534; 536 NW2d 755 (1995). *See also*, *Gladych v New Family Homes, Inc*, ___ Mich ___; ___ NW2d ____; 2003 WL 21500399, *3 (July 1, 2003), *Bigelow v Walraven*, 392 Mich 566, 576; 221 NW2d 328 (1974).

Here, there is no dispute that notice of intent provided the defendants with the factual basis for plaintiff's claim and they understood the essential basis of the claim before the statute of limitations expired. Defendants knew of the claim and had the information needed to begin their investigation and preparation to defend. While there could be defects that might render a notice of intent insufficient to serve the purposes of the statute of limitations, such as failure to even name the defendant (*see e.g., Rheaume v*

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[19]Such a dismissal would be without prejudice. *See Dorris v Detroit Osteopathic Hospital Corp*, 460 Mich 26, 47; 594 NW2d 455 (1999).

*Vandenberg,*232 Mich App 417; 591 NW2d 331 (1998), *lv denied*, 604 NW2d 678 (1999)), that was not true of the notice in this case. Indeed, it is clear that had plaintiff not been forced to put off filing her complaint until the expiration of the statute of limitations because of the mandatory waiting period under §2912b(1), she could have timely filed a medical malpractice complaint that contained nothing more than the allegations and information found in her notice of intent and served it, and the statute of limitations would have been tolled. *See. Doyle, supra*. Mrs. Roberts would have been afforded leave to amend the complaint to cure any defects in its substance and that amendment would have related back to the time of filing, thereby avoiding any limitations bar. *Id.* MCR 2.118(D).

Thus, the statutory scheme at issue here, as applied by the trial court and as advocated by defendants, operates to deprive plaintiff of her property rights in her claim and her right of access to the courts in a manner that is wholly arbitrary and unreasonable. The plaintiff's claim was dismissed as time-barred even though such a dismissal bears absolutely no relationship at all to furthering the policies behind the statute of limitations. Such an unfair and capricious deprivation of rights, without any opportunity to be heard at a time when defects that are inconsequential to the statutory purpose might be cured, clearly violates plaintiff's due process rights. Our courts have repeatedly indicated that limitations periods that are "so harsh and unreasonable in their consequences that they effectively divest plaintiffs of the access to the courts intended by the grant of the substantive right" are unreasonable restrictions that violate due process. *Forest v Parmalee*, 402 Mich 348, 359; 262 NW2d 653 (1978), *Taxpayers Allied for Constitutional Taxation*, 450 Mich 119, 125-126; 537 NW2d 596 (1995), *Bissell v Kommareddi*, 202 Mich

App 578, 581; 509 NW2d 52 (1993), *lv denied*, 446 Mich 861; 521 NW2d 611 (1994). That is plainly the result here -- the limitations statute, as applied, would operate to deprive plaintiff of access to the courts on her medical malpractice claim, completely abrogating her substantive right without any rational reason for finding the claim time-barred. *Forest v Parmalee*, 402 Mich 348, 359; 262 NW2d 653 (1978), *Taxpayers Allied for Constitutional Taxation*, 450 Mich 119, 125-126; 537 NW2d 596 (1995), *Bissell v Kommareddi*, 202 Mich App 578, 581; 509 NW2d 52 (1993), *lv denied*, 446 Mich 861; 521 NW2d 611 (1994).

No doubt defendants will argue that even if such a dismissal does not further the policies behind the statute of limitations, it furthers a theoretical legislative goal of encouraging plaintiff's to provide notices that strictly comply with §2912b(4), thereby possibly facilitating pre-suit settlement discussions. If this was the legislature's goal, then the tolling provision of §5856(d) is actually a penalty provision. It mandates that the plaintiff who mails her notice within 182 days of the expiration of the statute of limitations must file a "compliant" notice, or face the certain consequence that her case will be dismissed on statute of limitations grounds. In other words, it is a sanction of dismissal with prejudice for failure to meet a procedural requirement, and there is no option given for a lesser sanction and no opportunity given to cure a judicially determined defect before the sanction is imposed.

Again, the deprivation of due process is evident. "Our legal system is ... committed to a ... policy favoring disposition of litigation on the merits ..., which will frequently be found to be overriding." *North v Dep't of Mental Health*, 427 Mich 659, 662; 397 NW2d 793 (1986); *see also*, *Rogers v JB Hunt Transport, Inc*, 466 Mich 645, 654; 649 NW2d 23

(2002). For this reason, the sanction of dismissal with prejudice is viewed as "a harsh sanction to be used only in 'extreme cases'. *North*, *supra* at 670 (Levin, J., separate opinion).

> [T]he particular sanction of dismissal with prejudice or judgment is 'draconian', *Marrocco v General Motors Corp*, 966 F2d 220, 223 (7th Cir. 1992), and 'must be infrequently resorted to by district courts". *Schilling*, 805 F2d at 275. In the normal course of events, justice is dispensed by hearing of cases on their merits; only when the interests of justice are best served by dismissal can this harsh sanction be consonant with the role of the courts.

Barnhill v United States, 11 F3d 1360, 1367 (CA 7, 1993). Accordingly, imposition of the sanction of a dismissal with prejudice is universally deemed an "abuse of discretion" absent a finding by the trial court that there is a clear record of delay for which the plaintiff is responsible or contumacious conduct or prejudice to the defendant or a determination that other less drastic sanctions would prove or have proven unavailing. *North*, *supra* at 662, *Vincenzo v Ramirez*, 211 Mich App 501, 506-507; 536 NW2d 280 (1995), *Barnhill*, *supra*.

Although admittedly, the foregoing discussion of the sanction of involuntary dismissal involves judicially-enacted court rules or common law determinations by courts in aid of their authority to punish and prevent misconduct that interferes with the administration of justice, the reasoning applies equally well to a legislatively established sanction of dismissal without prejudice as exemplified by the statutory scheme at issue here. The courts have determined that it is an "abuse of discretion" to impose the sanction of involuntary dismissal absent extreme circumstances of misconduct, neglect or prejudice to the defendant. *North*, *supra; Vincenzo*, *supra*. An "abuse of discretion" is defined as a decision that is "'so grossly violative of fact and logic that it evidences not the exercise

of will but the perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.'" *Dacon v Transue*, 441 Mich 315, 328-329; 490 NW2d 369 (1992), *quoting Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959). If it is "grossly violative of fact and logic", evidencing a "perversity of will", for a court to employ the harsh sanction of dismissal without prejudice absent the necessary finding of extreme circumstances, then it is perforce arbitrary and capricious for the legislature to require the imposition of such a sanction without any opportunity for a court to consider the circumstances or make findings that would support such a deprivation of the plaintiff's property interest in access to the courts on her medical malpractice claim. In this case there has been and could be no showing that the plaintiff engaged in intentional misconduct or delayed or neglected to take advantage of any opportunity to correct her notice once defects were alleged or determined, or refused to obey a court order. It is very clear that absent the penalty imposed by statute for noncompliance, it would have been an abuse of discretion for a court to order an involuntary dismissal under the circumstances of this case. *See*, *North, supra*. How can it be said that a legislative scheme that requires precisely such a sanction is not an unreasonable interference with the plaintiff's property rights violative of process?

Indeed, where there is no tolling issue (e.g., notice is mailed more than 182 days before the statute of limitations expires), the Michigan courts have already recognized that the appropriate remedy for failure to comply with the notice requirement is a dismissal ***without prejudice***. *See*, *Gregory v Heritage Hospital*, decided *sub nom*, *Dorris v Detroit Osteopathic Hospital*, 460 Mich 26, 47; 594 NW2d 455 (1999). "'There are numerous

instances in which the law requires fulfillment of a condition precedent before the filing of a complaint, *and failure to comply with the condition may result in a dismissal, but not on the merits.* ...The condition in this case [presuit notice] falls within the scope of this rule. " *Neal v Oakwood Hospital Corp*, 226 Mich App 701, *quoting with approval*, *Foil v Ballinger*, 601 P2d 144 (Utah, 1979) (discussing that state's similar presuit notice requirement in medical malpractice cases.)

The U.S. Supreme Court explained the rationale for this practice in *Costello v United States*, 365 US 265, 81 S Ct 534, 5 L Ed 2d 551 (1961) when it discussed the application of Fed R Civ P 41(b), which is identical to MCR 2.504, on the effect of involuntary dismissals. While the rule specifies that involuntary dismissals are usually with prejudice, unless otherwise specified, the Court held that there must be an exception where the dismissal is based on the failure to meet some precondition to filing suit which does not go to the merits of the substantive claim. *Supra*, 365 US at 285. The rule is not to be used to give preclusive effect to a dismissal for defects in pleadings or presuit requirements where the defendant suffered no inconvenience or prejudice in preparing to meet the merits of the plaintiff's claim because there was an initial bar to the court reaching the merits. *Id.* Again, as with the court rules regarding amendment and relation back, the objective is clear: A plaintiff should not be deprived of her fundamental property interest in access to the courts on the merits of her claim because of a defect that had no prejudicial effect upon the defendants' ability to defend against the merits of the claim.

In examining another provision of the same legislative package, the affidavit of merit requirement, this Court has indicated its understanding of the unfairness that could be

created by a judicial determination, after the limitations period has run, that a condition to tolling has not been completely satisfied. In *Scarsella v Pollack*, 461 Mich 547; 607 NE2d 711 (2000), this Court upheld and adopted the Court of Appeals opinion which held that the where the plaintiff failed to file or serve an affidavit of merit with the complaint, the statute of limitations would not be tolled because §2912d required that an affidavit of merit containing certain specified information "shall" be filed with the complaint. The Court reasoned that the complete absence of an affidavit of merit rendered the filing of the complaint ineffective to commence the action prior to the running of the statute of limitations. *Supra*, at 550.

After adopting the Court of Appeals opinion, this Court took great pain to make several things clear. First, it cited its favorable discussion of *Vandenberg v Vandenberg,* 231 Mich App 497; 586 NW2d 570 (1998) in *Dorris/Gregory*, *supra.* There, the Court indicated that in circumstances where the plaintiff filed the complaint but did not attach the affidavit, but did serve the defendant with the complaint ***and*** the affidavit such that the defendant had access to the affidavit from the date of filing and suffered no prejudice, a dismissal without prejudice was appropriate. *Id* at 551. In the present case, as discussed earlier, there can be no question that the notice of intent sufficiently complied with the notice content requirements of §2912b(4) to such an extent that within the limitations period defendants were well aware of the factual basis and nature of the claim that they were called upon to defend. There was no prejudice.

Second, in *Scarsella* this Court noted that while there can be no tolling where the affidavit is not filed with the complaint, persons who cannot provide the required affidavit

may obtain an extension of time from the court to do so, thus curing the defect and preventing a dismissal on statute of limitations grounds. *Id* at 552. By contrast, the notice of intent provisions contain no such procedural safeguards. If a notice is determined to be defective after the complaint and affidavit have been filed, there is no opportunity to cure the insufficiency. Under the defendants' and the trial court's construction of the statutory scheme any insufficiency, regardless of its effect or the plaintiff's lack of culpability in creating the insufficiency, requires dismissal on statute of limitations grounds.

Finally, in *Scarsella* this Court restricted its holding to those situations where the plaintiff "wholly omits to file the affidavit required" by §2912d(1). It specifically indicated that its holding did not apply to a situation "in which a court subsequently determines that a timely filed affidavit is inadequate or defective." *Id.* In a footnote this Court left open the question of how well the affidavit would have to be framed to toll the statute of limitations and whether the failure to file an affidavit because of a *bona fide* dispute about the legal nature of the case would permit tolling. *Id* at fn 7. These comments would seem to indicate an apparent recognition by this Court of the unfairness and injustice that might be worked if a case were to be dismissed on statute of limitations grounds because of a post-limitations period (and at that point incurable) determination of some insubstantial defect that would not prejudice the defendants, or because of a good faith and well-grounded legal argument regarding the need for an affidavit. Yet, that is precisely the situation that will be created in this case if dismissal is affirmed.

Plaintiff contends that such injustice rises to the level of arbitrary and irrational destruction of her property right of access to the courts on her malpractice claim without

any provision of proper procedural safeguards. If this Court chooses to adopt such a construction of the tolling provision, then it violates Due Process and must be declared unconstitutional.

RELIEF REQUESTED

Plaintiff-Appellee, Lisa Roberts, respectfully requests that this Honorable Court affirm the order of the Michigan Court of Appeals and remand this case to the trial court for consideration on the merits.

Respectfully submitted,

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Dated: July 29, 2003

STATE OF MICHIGAN

IN THE SUPREME COURT

LISA ROBERTS,

Plaintiff-Appellee,

-vs-

MICHAEL ATKINS, M.D.,

Defendant-Appellant,

and

MECOSTA COUNTY GENERAL HOSPITAL, GAIL A. DESNOYERS, M.D., BARB DAVIS, and OBSTETRICS AND GYNECOLOGY OF BIG RAPIDS, P.C., f/k/a GUNTHER, DESNOYERS & MEKARU,

Defendants.
_____/

Supreme Court Nos. 122312, 122335, 122338

Court of Appeals No. 212675

Mecosta County Circuit Court No. 97-12006-NH

PROOF OF SERVICE

STATE OF MICHIGAN)
)SS
COUNTY OF WAYNE)

MARK GRANZOTTO, being first duly sworn, deposes and states that on the 29th day of July, 2003, he mailed a copy of a **Plaintiff-Appellee's Brief on Appeal** to the following:

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by placing said documents in the United States mail with postage affixed thereto.

Further deponent saith not.

MARK GRANZOTTO

Subscribed and sworn to before me
this 29th day of July, 2003.

Margaret P. McGregor
Notary Public, Wayne County
My commission expires: 08/29/03